State Water Resources Control Board

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Arnold Schwarzenegger
Governor

MAR 2 9 2005

Water Docket, ID No. 2003-0063
U.S. Environmental Protection Agency
Mail Code 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Sir or Madam:

COMMENTS ON THE PROPOSED RULEMAKING AND NOTICE OF INTERPRETIVE STATEMENT ON APPLICATION OF PESTICIDES TO WATERS OF THE UNITED STATES IN COMPLIANCE WITH FIFRA

On behalf of the California State Water Resources Control Board (State Water Board), we have reviewed the Proposed Rulemaking and Notice of Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA (Proposed Rule) and now submit the following comments. The Proposed Rule would exclude from the definition of "pollutant" those pesticides that are applied to, over, or near waters so long as they are applied consistent with the label instructions pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Furthermore, the Proposed Rule would exempt from the definition "any residual product that is an inherent, inextricable element of the pesticide application".

First, we hereby incorporate by reference our comments submitted on October 14, 2003 (copy enclosed), which largely focused on the conflict between the Interim Statement and the Ninth Circuit decision in *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526. We do not believe that the explanation included in the Proposed Rule adequately distinguishes the *Talent* decision, and therefore we believe the Proposed Rule should at least exclude the Ninth Circuit from its application.

Second, we wish to elucidate upon one of the serious but apparently unintended consequences the Proposed Rule would have on other programs, in particular, the Total Maximum Daily Load (TMDL) program. Subparagraphs (1)(A) and (1)(B) of section 303(d) of the Clean Water Act (33 U.S.C. § 1313(d)) require the states to create a list of waters that fail to meet water quality standards ("the 303(d) List"). Subparagraphs (1)(C) and (D) in turn require the states to establish the "total maximum daily load" of each "pollutant" that is impairing each water body on the 303(d) List. On the most current U.S. Environmental Protection Agency (USEPA) approved 303(d) list, California has identified 359 pollutant/water body combinations that require

pesticide-related TMDLs. That accounts for 27% of the water bodies on the California 303(d) List. These waters are impaired (i.e., water quality criteria are violated and designated uses are damaged) from these chemical or biological constituents irrespective of whether the particular constituent was discharged consistent with the label instructions as required by FIFRA.

We know of no tracer or other means of distinguishing between those pesticide molecules that were discharged consistent with the label instructions and those that were not, and therefore we have no way of knowing, under the Proposed Rule, whether for instance, a copper-impaired water is impaired by "pollutants" (requiring a TMDL), or just by appropriately used product (not requiring a TMDL). Even assuming we could identify those waters polluted partially by "non-pollutant" copper discharges, we have no way of allocating, much less determining compliance with load or waste load allocations based on such a distinction.

Third, we note that although the Proposed Rule purports to rely upon the existence of another federal regulatory authority, FIFRA, the rationale is not so limited. The analysis accompanying the Proposed Rule states that:

> "Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment." (70 Fed.Reg. 5099 (February 1, 2005).)
>
> "Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on whether or not it is a chemical waste or biological material within the meaning of the statute, and this can only be determined by considering the manner in which the pesticide is used. Where a pesticide is used for its intended purpose and its use complies with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and, therefore, is not a pollutant . . . . " (70 Fed.Reg. 5099-5100.)

The definition of "pollutant" in the statute or the regulations does not turn on the existence of another applicable federal environmental authority. Rather, the crux of the above language is that properly used products are not pollutants. However, such a distinction is defied by the Clean Water Act and USEPA's own regulations. For instance, intentionally and properly placed fill material nevertheless requires a section 404 (33 U.S.C. § 1344) dredge or fill permit. While "fill material" is undoubtedly a pollutant, by definition it is material that has been properly added to the water for, in this case, the purpose of construction. (See 40 C.F.R. § 232.2.) Properly applied fertilizers nevertheless create nutrient loading and accelerated eutrophication. A more direct example is chlorine (similar to a pesticide), which is used in wastewater treatment plants to kill organisms that could prevent the receiving water from being used for domestic purposes. Even though properly applied, national pollutant discharge elimination system (NPDES) permits for publicly owned treatment works have long contained effluent limitations for chlorine, but this

new definition of "pollutant" would call that into question. Under the rationale of the Proposed Rule, we may have no authority over such chlorine discharges or residual chlorine. Nothing would preclude the rationale used for this interpretation from being applied to every other constituent currently deemed to be a pollutant.

The Clean Water Act's mandate to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" is not qualified by the suffix: "unless the impaired integrity was caused by properly applied product." California believes that if USEPA wishes to create an exemption for pesticide applications conducted in compliance with FIFRA, it should seek revisions to FIFRA and/or the Clean Water Act, clarifying that NPDES permits are not required, rather than attempting to obtain that result through strained interpretations of existing law.

If you have any questions about this matter, please contact Senior Staff Counsel Michael J. Levy in the Office of Chief Counsel at (916) 341-5193.

Sincerely,

Celeste Cantú
Executive Director

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